

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11WB-60610-E
EEOC CHARGE NO. 17E-2009-00341

Eddie Clarke,)	<u>Administrative Action</u>
)	
Complainants,)	FINDING OF PARTIAL PROBABLE CAUSE
)	
v.)	
)	
Siemens Demag Delaval)	
Turbomachinery, Inc.,)	
)	
Respondent.)	

This is an employment discrimination matter. Eddie Clarke, who is Black and Jamaican, filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that while working as a machinist at Siemens Demag Delaval Turbomachinery, Inc. ("Siemens"), he was harassed by his supervisor and another employee based on his race and national origin despite his repeated complaints to Siemens, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Clarke amended his complaint to further allege that Siemens paid him less than similarly situated Caucasian employees because of his race and national origin, and retaliated against him for engaging in protected activity.

Siemens denied the allegations of discrimination in their entirety. It contends that it promptly investigated the allegations of race discrimination and found them to be unsubstantiated. It denied retaliating against Clarke. And it denied the allegations of differential pay, arguing that others were paid more because they possessed greater levels of skills and experience.

The DCR reviewed various documents, obtained information from the parties, and interviewed several current and former Siemens' employees as part of its investigation. Based on the information gathered during the investigation, the Director now finds, for purposes of this disposition only, as follows.¹

Summary of Investigation

Clarke is a resident of Hatfield, Montgomery County, Pennsylvania, and had worked as a machinist for years when, in August 2007, he applied for work at the Siemens facility in Hamilton, Mercer County, New Jersey.

Siemens hired him on or around September 24, 2007, and assigned him to work in Department 102 under the supervision of John Swan. During the relevant time period, Siemens employed nineteen machinists in Department 101 (eleven were Caucasian, five were Black, and three were Hispanic) and twelve machinists in Department 102 (ten were Caucasian, one (i.e., Clarke) was Black, and one was Hispanic). Witnesses told DCR that Clarke was the first and only Black machinist to work in Department 102 at its Hamilton facility.

Clarke and Nikolaus Ilczenko worked on different shifts but used the same machine. Clarke alleged that Ilczenko repeatedly harassed him verbally and through notes left on the machine for Clarke to find when he arrived at work. Many of Ilczenko's comments were focused on the condition that Clarke left the machine after his shift. Clarke believed that those comments were unwarranted and motivated by a racial animus. Clarke stated that he complained to Swan and Ilczenko's shift supervisor, Marty McMahon, but nothing was done to stop it. Clarke alleged that in addition to failing to address Ilczenko's conduct, Swan harassed him by scrutinizing his work more closely than Caucasian machinists.

¹ In addition to the present matter, Clarke and two other employees filed complaints with the U.S. Equal Employment Opportunity Commission (EEOC) and DCR alleging that someone at Siemens hung a noose in the work area and that their employer failed to respond adequately, among other allegations. See Clarke v. Siemens, Docket No. EL11RB-63129; Daniels v. Siemens, Docket No. EL11RB-63128; and Murphy v. Siemens, Docket No. EL11RB-63130. Those complaints are being addressed separately.

The parties disagree as to when Siemens first became aware of Clarke's allegations of discrimination. Siemens contends that it had no notice that Clarke was alleging national origin discrimination until it received the instant DCR complaint, and that it first learned of his allegation of race discrimination during a May 4, 2009, union grievance hearing.

Clarke, on the other hand, told DCR that he began complaining about race discrimination in 2007, when he learned that Scott and Don Musico were hired at three dollars per hour more than him. Clarke said that he and other Black employees met with former CEO Charlie Edwards in early February 2008 regarding what they perceived to be unfair treatment based on race. Clarke stated that in addition to concerns about differential pay, they asked Edwards why no Black employees were given the opportunity to become supervisors or run the computerized machines, and why Human Resources (HR) was taking no action with regard to their complaints. Edwards wrote a letter to those employees, dated February 12, 2008, which stated as follows:

Gentlemen, I wanted to thank each of you for meeting with me last week and coming forward with issues that have been upsetting and disturbing to you. I sincerely appreciate your openness. As I am on vacation this week, I would like to meet with all of you at 3:00 p.m. on 20 February in Conference Room "C" to clarify and affirm the issues.

Clarke stated that during follow-up meetings, Edwards told HR Manager Cheryl R. Tatler-Pedersen to change Clarke's pay scale to the same as the Musicos, but that the directive was not carried out.

On January 18, 2008, Clarke received his initial performance evaluation from Swan. Swan wrote that Clarke "will prove to be a superior machinist." On March 17, 2008, Clarke received another positive performance evaluation from Swan, who wrote that "Mr. Clarke demonstrates the skills and knowledge that are expected of a qualified machinist" and "always performs at a level that is at or beyond expectation of his manager."

Clarke told DCR that Swan began to retaliate against him for complaining about the harassment. He alleged that during a staff meeting, Swan announced that anyone who went to HR without consulting with him first would get caught in "friendly fire" which, he explained, was a

military term referring to a soldier being killed by his fellow soldiers. A non-African American witness confirmed that Swan discussed "friendly fire" during the meeting. That witness told DCR that he believed that Swan was directing the comments to Clarke. Clarke told DCR that sometime after the "friendly fire" meeting, he found a metal shank placed in his work area that he believes was positioned to injure him. Clarke told DCR that on another occasion, Swan told the staff that there would be no further overtime because Clarke had complained to HR.

Swan's evaluations of Clarke's performance became less favorable. In a September 20, 2008 evaluation, Swan noted that Clarke's "time could be used more effectively" and that he was having "difficultly effectively communicating" with co-workers. In a March 24, 2009 evaluation, Swan stated that Clarke's "performance has declined," that he was producing more nonconforming parts, "taking an inordinate amount of time" to complete assignments, and that there was a "need for improvement."

Following the March 24, 2009 evaluation, Clarke was removed to a different machine, which he alleges, adversely affected his ability to earn overtime. Clarke stated that the reassignment was intended to punish him for raising allegations of race discrimination. However, Siemens told DCR that Clarke was moved following the evaluations so he could perform less complicated tasks since he had more non-conforming parts when he had been moved to more difficult assignments.

Clarke filed a union grievance concerning the March 24, 2009 evaluation. During a hearing on the grievance, Clarke stated that he was being harassed by Swan and Ilczenko. Tatler-Pederson, who was representing management, requested a break in the grievance hearing so that she could investigate Clarke's allegations. Tatler-Pederson interviewed Clarke and six other employees, and confirmed that some of the incidents described by Clarke occurred. For example, she confirmed that Ilczenko would remark that Clarke did not perform his job properly or clean up his work area. However, she concluded that Clarke was not treated differently than other employees, and found no evidence that the remarks or incidents were racially motivated.

In the course of investigating the charge that a discriminatory and retaliatory animus tainted

Swan's evaluations of Clarke's performance, DCR interviewed a Caucasian machinist who told DCR that Swan often made derogatory statements about Clarke, and would refer to him as "nigger" when Clarke was not present. He stated that Swan constantly "bashe[d]" Clarke for insignificant things, and tried to "set up" Clarke in an attempt to get him fired. He stated, for example, that Swan collected metal scraps left by Clarke and prepared "nonconforming parts reports," but overlooked similar errors made by other machinists. He stated that Swan was trying to try to show problems with Clarke's work. The witness stated that he believed Swan's treatment of Clarke was racially motivated, and that at one point, Swan stated, "I'm gonna get rid of that nigger."

Another machinist told DCR that he supervised Clarke for ten years at another company before they both joined Siemens. He stated that Clarke was an "outstanding" machinist. He stated that Swan supervised Clarke more closely than other employees and was excessively critical over minor mistakes. He stated that Swan was not as harsh with other employees even when they made major mistakes.

Witnesses stated that multiple Caucasian machinists used racial slurs in the workplace. A witness said that it was the "kind of atmosphere where guys feel they can get away with racial remarks," and that when problems arose, Siemens simply moved employees to different departments and shifts without addressing the environment. He cited Clarke's move from one machine to another after he complained about Swan as an example. A Caucasian employee noted that some of the Caucasian employees were giving the "cold shoulder" to African-American employees.

Several African-American employees told DCR that they had little faith that the HR Department would adequately address issues of race discrimination in the workplace. Employees of different races told DCR that when Tattler-Pederson interviewed them as part of her internal investigation, she asked only a few very pointed questions and they did not feel at liberty to speak freely or to volunteer information for her investigation. One witness said, "It seemed like they only wanted to hear what they wanted to hear."

Siemens also denied the allegation of wage discrimination. It acknowledged that Clarke was paid less than Don and Scott Musico, but claimed that the Musicos started at a higher hourly rate because they had more relevant experience. Siemens stated that the Musicos previously owned and operated a machine shop and had significantly more experience than Clarke with the type of machines used in Siemens's facility. Siemens stated that Scott Musico had experience in both programming and operating one of the most complex and sophisticated machine types--Computer Numerical Controlled machines--while Clarke had experience only in operating those machines. Siemens asserted that Scott's father, Don Musico, had over thirty years experience with conventional machines and was able to operate virtually every machine used at Siemens's site. The job applications and resumes indicate that Clarke has been a machinist since 1986, and a machinist/tool die maker since 1989. Scott Musico had experience in the field since 1990, and was a production manager. Don Musico had experience in the field since 1973, served as foreman at two former jobs and ended as president of Ramapo Machine. Siemens stated that Clarke's qualifications and background were similar to Caucasian employees M.H., M.R., D.H., and A.S., as well as J.L., who is Hispanic, and that they all started at \$23 per hour and received increases pursuant to the union contract. A review of Siemens's records confirmed that Clarke received the same rate as M.H., M.R., D.H., A.S., and J.L.

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit a complainant's allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe" that the LAD was violated. Ibid. If the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits but merely an "initial culling-out process" whereby the Director makes a preliminary determination of whether further agency action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App.

Div. 1978). See also Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799.

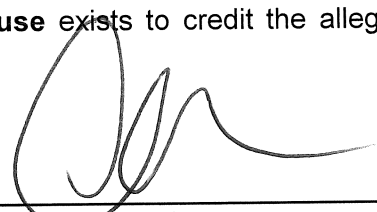
The evidence outlined above supports a reasonable suspicion that Clarke was subjected to unlawful race-based discrimination in Siemens's workplace by his supervisor, Swan, and that despite complaints to company authorities, no effective corrective action was taken to alleviate the situation. The investigation found that Swan's evaluations of Clarke's performance may have been tainted by racial and retaliatory animus. Witnesses supported Clarke's allegations that Swan subjected him to harsher treatment than similarly situated machinists, with one reporting that Swan said with respect to Clarke, "I'm gonna get rid of that nigger." The investigation also corroborated that Swan may have been motivated to retaliate against Clarke for complaining to HR about discrimination.

The investigation did not substantiate that Clarke was paid a lower salary than comparable employees because of his race or national origin. Although it is true that Caucasian employees Scott and Don Musico received a higher wage than Complainant, the investigation found specific circumstances concerning the background of the Musicos having owned and operated their own machine shop. The investigation found that other than the Musicos, Clarke was paid a similar wage to all other machinists hired around the same time, whether Caucasian, African-American, or Hispanic.

In view of the above, it is found that **Probable Cause** exists to credit the allegations of race discrimination and retaliation and that **No Probable Cause** exists to credit the allegations of national origin discrimination and differential pay.

Date

8-13-14



Craig Sashihara, Director
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